Macerich Management Company *and* United Brotherhood of Carpenters and Joiners, Local 586, United Brotherhood of Carpenters and Joiners of America, AFL–CIO

Macerich Property Management Company *and* Carpenters Local 505, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Cases 20–CA–29636-1 and 20–CA–29918–1 (formerly 32–CA–18123–1)

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 26, 2001, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondents and the General Counsel filed exceptions, briefs in support of exceptions, and respective answering and reply briefs.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

I. INTRODUCTION

This case raises the issue of whether six rules maintained and enforced by two California shopping malls constituted reasonable time, place, and manner restrictions under State law. Applying California law, we find for the reasons discussed below that the Respondents violated Section 8(a)(1) of the Act by unlawfully restricting the content of picket signs, handbills, and other written materials. Thus, we agree with the judge that Respondent Macerich Management Company (MMC) unlawfully threatened union handbillers with arrest at Arden Fair Mall on December 16, 1999. Contrary to the judge, however, we find that Respondents' ban on the carrying or wearing of signs, their requirement that all expressive activities occur in "designated areas," and their ban on all expressive activity during peak traffic times are reasonable time, place, and manner restrictions that do not violate the Act. Also, contrary to the judge, we find that Respondent Macerich Property Management Company (MPMC) unlawfully threatened union picketers with arrest at Capitola Mall on March 7, 2000, and had union picketers unlawfully arrested on March 21 and May 3, 2000.

II. FACTS

Arden Fair and Capitola Malls, located in Sacramento and Capitola, California, respectively, are enclosed regional shopping centers. Respondent MMC operates Arden Fair, and Respondent MPMC operates Capitola.[3] Both use the same set of rules for regulating expressive activities other than those sponsored by the malls or their tenants as well as "activity otherwise expressly allowed . . . by the National Labor Relations Act or state labor laws." Both use standardized internal policies and guidelines to implement the rules. Any individuals seeking to engage in expressive activity at these two malls must first file an "Application for Access for Non-Commercial Expressive Activities" on a form provided by the Respondents. By signing the application, each applicant agrees to abide by the malls' rules of conduct. Both malls also maintain a code of conduct applicable to all mall visitors.

A. The Challenged Rules

The rules alleged to be impermissible include: (1) a ban on activities that identify by name the mall owner, manager, or mall tenants; (2) a ban on signage and written materials that interfere with the "commercial purpose" of the mall; (3) a ban on the carrying or wearing of signs; (4) an application process that requires the presubmission of written materials; (5) the exclusion of exterior areas, including mall sidewalks, from designated areas where activities may occur; and (6) the prohibition of activities during "peak traffic days" on the exterior areas of the mall, including sidewalks.

According to Suzanne Valentine, the Respondent's marketing vice president, the general purpose of these rules was to protect the commercial activity of the center, provide shoppers with a pleasant shopping ambience, and to protect shoppers' safety. As for each rule's specific purpose, the general manager of Arden Fair, Carmen Lytle, testified that the ban on activities identifying the mall owner, manager, or tenants was to control negative publicity. As Valentine explained, "[W]e can't allow somebody to just come in and make a statement about us that is not true." Referring to the ban on signage that interferes with the "commercial purpose" of the mall, Lytle stated that it made no sense to allow anything that would hurt the owner or tenants financially.

According to Valentine, the ban on carrying signs was necessary to prevent any negative impact on the businesses, to prevent people from having to walk out of their way to avoid the expressive activity, to keep any signage looking professional, and to protect individuals

[1] The Charging Party filed a joinder in reply brief of the counsel for the General Counsel.

[2] We have modified the recommended Order and notice to more accurately reflect the violations found.

[3] The two Macerich companies employ the same corporate staff and exist as two different entities only because the two ownership structures for the malls are different.

from getting injured, e.g., by the sticks attached to the signs. Lytle admitted that the main purpose of requiring presubmission of written materials was to ensure compliance with the ban on identifying the mall owner or tenants by name as well as the ban on signage that interfered with the malls' "commercial purpose." According to Valentine, limiting activity to certain designated areas was to allow "easy traffic flow" and to comply with local fire codes, which varied by jurisdiction. Sidewalks were excluded from the designated areas for expressive activity because they were not wide enough and shoppers might be forced to walk into the street to avoid that activity. The peak traffic ban, prohibiting all non-commercial expressive activity during the busiest shopping days of the year, was necessary to lessen the impact that any "extracurricular kinds of activities" might have on the malls' primary business of generating retail sales.

B. The Union Conduct

On December 16, 1999, Local 586 handbilled at the interior and exterior entrances to the Sears store at Arden Fair to protest the use of a nonunion contractor, Wadman Construction, to build a store in Roseville, California. Local 586 did not file an application beforehand because the Union's representative, Tom Brodsky, had been told by an Arden Fair employee that one was not necessary. Mall officials called the police after the handbillers refused to leave, and one of the union representatives was arrested. Brodsky went to Arden Fair after hearing about difficulties with mall security. At that time, he learned about the mall's rules and the requisite application, which he completed that same day. On December 22, the application was denied as untimely, incomplete, and ambiguous.

On March 7, 2000, Local 505 handbilled and picketed at Capitola Mall because a mall store, Gottschalk's, was building an Expressions store at Capitola using a nonunion contractor, Construction Developers. Two picketers walked back and forth at the jobsite in front of a temporary wall inside the mall, not blocking ingress or egress. The picketers left after the police arrived and warned them that they would be subject to citizen's arrest. Two weeks later, on March 21, four Local 505 representatives again picketed the Gottschalk's Expressions jobsite inside Capitola. When they refused to leave, they were placed under citizen's arrest. On May 3, 2000, Local 505 once again picketed inside the mall, this time immediately outside the store Software Etc., where Hardcastle Construction, a nonunion contractor, was performing work. Four picketers were arrested. Local 505 never completed applications beforehand.

III. ANALYSIS

California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979), 592 P.2d 341, affd. 447 U.S. 74 (1980). The pertinent principles of Board law are set forth in *Glendale Associates, Ltd.*, 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9th Cir. 2003):

> In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court held that an employer may lawfully bar nonemployee union organizers from private property (unless the employees are inaccessible through usual channels). In the absence of a private property interest, however, the Court's holding in *Lechmere* is not controlling. See *Bristol Farms*, 311 NLRB 437, 438 fn. 6 (1993) ("employer's exclusion of union representatives from private property to which the employer lacks a property right entitling it to exclude individuals likewise violated Section 8(a)(1) assuming the union representatives are engaged in Section 7 activities"). See also *Indio Grocery Outlet*, 323 NLRB 1138, 1142 (1997), [enfd. sub nom. *NLRB v. Calkins*], 187 F.3d 1080 (9th Cir. 1999).
>
> The Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. *Bristol Farms*, 311 NLRB at 438. The Board does so because it is State law, not the Act, that creates and defines the employer's property interest. Thus, an employer cannot exclude individuals exercising Section 7 rights if the State law would not allow the employer to exclude the individuals. Id. at [4]38; *Johnson & Hardin Co.*, 305 NLRB 690 (1991).

See also *Fashion Valley Shopping Center*, 343 NLRB No. 57 (2004).

Applying these principles to the facts of this case, we agree with the judge that the Respondents' ban on activities that identify by name the mall owner, manager, or tenant in the mall; ban on signage and written materials that interfere with the "commercial purpose" of the malls; and the requirement of the presubmission of written materials are content-based restrictions and not time, place, and manner restrictions permissible under California law. Accordingly, we find that the Respondents' maintenance and enforcement of these rules violated Section 8(a)(1).

The judge properly found that the rule banning activities that identify by name the mall owner, manager, or tenants is identical to the rule found to be unlawful in *Glendale Associates*, supra. As in *Glendale*, we find "no evidence" here demonstrating how this rule "promote[s] the kind of time, place, and manner restrictions that would pass muster under California law." Id. Indeed, this rule, on its face, is content based. See *Glendale Associates v. NLRB*, supra, 347 F.3d at 1155 ("rule restricting expressive activity that names a [mall] tenant, owner, or manager is a content-based restriction on speech and

fails to survive strict scrutiny.") Thus, the only purpose served by this rule is "to shield the Respondents' tenants . . . from being the subject of otherwise lawful handbilling." Id. at 28. Therefore, like the judge, we find this rule violates the Act.

We also find that the rule banning signage and written materials that interfere with the "commercial purpose" of the malls violates the Act. The purpose of this rule was to place restrictions on the content of the message so as to limit any negative publicity and not hurt sales. Plainly, the Act does not prohibit employees and their unions from asking consumers to boycott stores, even when the dispute is with another person. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988) (*DeBartolo II*). The Respondents' broad ban on all activity that "interferes with the commercial purpose" of the malls clearly would prohibit this protected activity. See *In re Cox*, 474 P.2d 992, 1003 (Cal. 1970). Because this rule solely regulates content, we find that it violates the Act.

The application process, which requires the presubmission of written materials, also violates the Act. Lytle, Arden Fair's general manager, admitted that she used this rule to screen written materials for compliance with the other rules banning activity that identifies the mall owner, manager, or tenants and banning signage that interferes with the "commercial purpose" of the malls. Accordingly, this rule regulates the content of written materials and signage, and does not seek to reasonably regulate the time, place, or manner in which they are displayed. Thus, the Respondents' application process violates Section 8(a)(1) of the Act.

Further, because the Respondent required Locals 586 and 505 to complete an application and abide by rules that are impermissible under California law, we find, contrary to the judge, that the Respondent MPMC violated Section 8(a)(1) by threatening to arrest, and actually arresting, picketers at the Capitola Mall on March 7 and 21, 2000, and May 3, 2000. See *H-CCH Associates v. Citizens for a Representative Government*, 238 Cal. Rptr. 841, 858 (Cal. Ct. App. 1987).

Contrary to the judge, however, we find that the Respondents' ban on the carrying or wearing of signs does not violate Section 8(a)(1). The judge found that this rule was a content-based restriction prohibited under *Glendale*, supra. We find, rather, that this rule is a permissible "manner" restriction under California law.[4] That is, it bans a particular manner in which a message is conveyed.

The Respondents manage enclosed shopping malls, whose corridors are often filled with people. The mall has a legitimate concern in ensuring the safety of its patrons and, to that effect, protecting them from being struck and possibly injured by a sign in an enclosed area. The rule also addresses the legitimate concern that the display of such signs could interfere with the sight lines of a store window. Clearly, the Respondents have the right to prevent interference with normal business operations and ensure public safety, and they are entitled to considerable deference in determining the best possible way to achieve these goals.

Furthermore, this finding is in accord with California law. In *Savage v. Trammell Crow Co.*, 273 Cal. Rptr. 302 (Cal. Ct. App. 1990), the court allowed a shopping center to ban entirely the distribution of leaflets from the parking lot. The court noted that *Robins*, supra, recognized a shopping center owner's right to "freedom from disruption of normal business operations and freedom from interference with customer convenience." Id. at 306. In this case, the record established that one of the Respondents' purposes in adopting this rule was to ensure the smooth and normal operation of the Respondents' business. The court also noted that the "validity of regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method." Id. at 308. Similarly, the Board's consideration of whether this rule violates the Act does not allow the Board to substitute its own judgment about safety and interference with normal business operations for that of the Respondents. Because the restriction is reasonably designed to ensure public safety and to prevent disruption with the malls' normal business operations, the restriction is in accord with California law, and thus not violative of Section 8(a)(1).

We also find, contrary to the judge, that the Respondents' designated areas requirement and peak traffic ban do not violate Section 8(a)(1). Relying on the plurality opinion in *Sears v. San Diego District Council of Carpenters*, 599 P.2d 676 (Cal. 1979),[5] the judge concluded that the Respondents had no property right to exclude or restrict union activity from the exterior sidewalks of the malls. *Sears*, however, cannot be relied on as controlling California precedent. In *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004), the D.C. Circuit certified questions to the Supreme Court of California asking: (1) whether the employer in that case had a general right under California law to prevent members of the public from engaging in expressive activity in the parking lot and walkways adjacent to its store; and (2) if so, whether, as *Sears* suggests, California law nevertheless permitted union organizers to distribute literature there because they were involved in a labor dispute with the employer.

[4] In this regard, we note that the Respondents have not banned all signs from the malls. The Respondents simply used their discretion to regulate the carrying and wearing of signs, i.e., the "manner" in which signs will be displayed.

[5] In *Sears*, the California Supreme Court recognized a labor union's right to engage in labor picketing on private sidewalks and parking lots outside a stand alone store. The plurality opinion rested on the "Moscone Act," Cal. Civ. Proc. Code § 527.3, and its special protection for labor activity, not on the State Constitution.

Waremart, supra at 871. When the Supreme Court of California refused to answer the questions certified to it, the D.C. Circuit issued its opinion in *Waremart* holding that *Sears* "does not [represent current California law] and that the National Labor Relations Board erred in relying on that decision." *Waremart*, supra at 874.[6]

As set forth above, the Board looks to State law to determine whether an employer has a property right to oust union representatives. In the instant case, the most recent and definitive statement of California law was made in *Waremart* where the court declared unequivocally that Sears does not represent California law. We are aware of no California court that has disagreed with that assertion.

We recognize that *Sears* and *Waremart* involved the Moscone Act and "stand-alone" stores, while the instant case involves a shopping mall and an asserted state constitutional right to picket there. Thus, the fact that *Sears* no longer applies is not a complete answer to the instant case. For, as noted supra, persons and organizations in California have a State constitutional right to come onto the "ministore downtown" of a shopping mall, subject to restrictions of "time, place and manner." We therefore turn to the question of whether the designated area and peak traffic ban rules are valid under the framework of *Robins v. Pruneyard Shopping Center*, supra, i.e., whether they are reasonable time, place, and manner restrictions. For the reasons set forth below, we conclude that they are.

As the judge noted, limiting expressive activity to the designated areas serves important safety interests by ensuring enough space on each side of an area for "traffic flow." The rule also assists the Respondents in complying with local fire codes. In addition, sidewalks were excluded from the designated areas because they were not wide enough to accommodate expressive activity and mall patrons, who might then be forced to walk in the street to avoid the activity.

Likewise, the peak traffic ban was needed to lessen the impact that any "extracurricular kinds of activities" might have on the increased foot traffic and the large volume of sales that occur during the holiday season. In support of its peak traffic ban, the Respondents testified that more than 75 percent of its tenants' sales are made during this holiday period and that patrons are lost to competitors if the Respondent is unable to control congestion and traffic flow during the busy holiday season.

California case law clearly teaches that designated area and peak traffic restrictions are reasonable restrictions to prevent disruption of normal business operations. In *Needletrades Employees v. Superior Court of Los Angeles County ("UNITE")*, 65 Cal. Rptr. 2d 838 (Cal. Ct. App. 1997), cited with approval by the Board in *Glendale Associates*, supra, a California appellate court upheld similar designated area and peak traffic ban rules. The court noted that "in promulgating time, place, and manner rules governing when, where, and how a group may exercise expressive rights, a shopping center is constitutionally permitted to protect 'important rights of substance; . . . freedom from disruption of normal business operations and freedom from interference with customer convenience.'" Id. at 847, quoting *H-CHH Associates*, supra. The court ultimately upheld the designated area rule of two malls, citing "legitimate concerns, such as public safety, traffic congestion, and free flow of commerce in the mall." Id. at 849. Similarly, the court also upheld each mall's peak traffic ban because the malls "had offered evidence to explain and justify that temporary ban." Id. at 850.

Like the malls in *UNITE*, the Respondents are reasonably concerned about ensuring public safety, avoiding traffic congestion, and keeping mall traffic flowing. The Respondents have shown that they have a legitimate safety concern that the width of the sidewalk is incompatible with demonstrations because mall patrons might be forced into the street to avoid the activity. Furthermore, the Respondents have shown a need to maintain "traffic flow" and to comply with local fire codes. Under the clear standard set forth in *UNITE*, the "designated area" rule is reasonable.

The peak traffic ban upheld in *UNITE* is also comparable to the peak traffic ban at issue here. In *UNITE*, the court upheld the rule simply because the malls in that case, without contradiction, had "offered evidence to explain and justify that temporary ban." Id. at 850. Similarly, the record shows that the Respondents have offered evidence to justify their ban. Specifically, the Respondents' witnesses testified, without contradiction, that their traffic doubles during these peak periods. In order to accommodate this increased traffic, the Respondents have decided to curtail certain activities to ensure that the increased traffic does not interfere with commercial operations. Furthermore, the record also shows that Respondents curtail their own noncommercial activities, e.g., construction, in the malls during these critical periods to avoid exacerbating the congestion problem.[7]

In assessing the reasonableness of the Respondents' rules, we also note that the Unions have available all nontrespassory avenues of protest. We do not suggest that the presence of alternative means can be the sole reason for banning activity in certain areas. However,

[6] The D.C. Circuit stated that the special protection for labor-related expressive activity embodied in *Sears* constitutes impermissible content discrimination in violation of the First Amendment. See *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (exempting labor picketing from restrictions applicable to other picketing violated First Amendment); *Carey v. Brown*, 447 U.S. 455 (1980) (same).

[7] See also *Costco Cos. v. Gallant*, 117 Cal. Rptr. 2d 344 (Cal. Ct. App. 2002) (the court upheld a similar peak traffic ban, noting that the ban was narrowly tailored to protect the stores' substantial interest in the smooth operation of its business during the busiest days of the year and that it was content neutral and left 300 other days during the calendar year in which expressive activity was permitted).

we find that it is relevant to the question of whether the rules are reasonable that the Unions can, for example, advertise their dispute in the media, and can picket and handbill on public property. Thus, there are "ample alternative channels for communication of the information." *Savage*, 273 Cal. Rptr. at 307 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). It does not matter that the Unions prefer to engage in their activity in certain areas of the Respondents' property on any day they choose.[8] "The adequacy of alternative channels is not measured by the fondest hopes of those who wish to disseminate ideas." *Savage*, supra at 308.

For all of the foregoing reasons, we find that the Respondents' rules that ban the carrying or wearing of signs, that restrict expressive activity to designated areas, and that ban expressive activity during peak traffic periods**,** are reasonable time, place, and manner restrictions under the law of California. It follows that the rules are legal under the Act. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992).

ORDER

The National Labor Relations Board orders that

A. The Respondent, Macerich Management Company, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule banning activities that identify by name the Arden Fair Mall owner, manager, or tenants.

(b) Maintaining and enforcing a rule that bans signage and written materials that "interfere with the commercial purpose" of the Arden Fair Mall.

(c) Maintaining and enforcing a rule that requires the presubmission of written materials for the purpose of enforcing the rules cited in paragraphs 1(a) and (b), above.

(d) Interfering with handbilling or picketing at Arden Fair Mall by maintaining an unlawful application policy.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rules indicated in paragraphs 1(a) through (c) above, and remove the language from the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Arden Fair Mall, and from any other document within the custody and control of Macerich Management Company wherever such rules may be contained.

(b) Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of Arden Fair Mall in Sacramento, California, copies of the attached notice marked "Appendix A."[9] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to the public are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1999.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, Macerich Property Management Company, Capitola, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule banning activities that identify by name the Capitola Mall owner, manager, or tenants.

(b) Maintaining and enforcing a rule that bans signage and written materials that "interfere with the commercial purpose" of the Capitola Mall.

(c) Maintaining and enforcing a rule that requires the presubmission of written materials for the purpose of enforcing the rules cited in paragraphs 1(a) and (b), above.

(d) Interfering with handbilling or picketing at Capitola Mall by maintaining an unlawful application policy, by threatening to cause the arrest of, and by causing the arrest of individuals affiliated with Carpenters Local 505, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[8] In fact, California law expressly grants to property owners the right to restrict the place where expressive activity may occur. *Robins v. Pruneyard Shopping Center*, supra, 592 P.2d at 347.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rules indicated in paragraphs 1(a) through (c) above, and remove the language from the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Capitola Mall, and from any other document within the custody and control of Macerich Property Management Company wherever such rules may be contained.

(b) Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of Capitola Mall in Capitola, California, copies of the attached notice marked "Appendix B."[10] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to the public are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 2000.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

California law permits the exercise of free speech in private shopping malls, subject to reasonable, content-neutral time, place, and manner regulations by the property owner. *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979). This case turns on the reasonableness of certain rules the Respondents maintain and enforce concerning noncommercial expressive activity at Arden Fair and Capitola Malls.

Contrary to the majority, I would find that the Respondents' ban on the carrying or wearing of signs, their requirement that all expressive activity occur only in "designated areas" located inside the malls, and their ban on all expressive activity during peak traffic times ("peak traffic ban") on the malls' exteriors, are unlawful, because they are not narrowly tailored.[1] I address each of the three rules in turn:

1. The ban on signs

The Respondents contend that the ban on wearing or carrying of signs is necessary to ensure the safety of mall patrons and to prevent interference with the malls' commercial purpose. Rather than regulating the manner in which signs may be carried or worn—either by limiting the sign's size or simply banning the sticks attached to those signs—that rule totally eliminates the protected right to picket. In doing so, the Respondents have used means substantially broader than necessary to meet their asserted goals of safety and protecting commercial interests.[2] In finding that the Respondents have failed to narrowly tailor this rule, as required by California law, I am not substituting my business judgment for that of the Respondent. Clearly, this blanket prohibition is not a reasonable time, place, and manner restriction.

2. The designated-areas rule and the peak-traffic rule

The rule requiring all noncommercial expressive activity to be conducted in designated areas within the malls' interiors, and the other rule banning all such activity during peak traffic periods, also violate the Act.

Relying on *Sears v. San Diego District Council of Carpenters*, 599 P.2d 676 (Ca1. 1979),[3] the judge concluded that the Respondents had no property right to exclude or restrict union activity from the malls' exterior sidewalks. While this case was pending before the Board, however, the United States Court of Appeals for the District of Columbia Circuit issued its decision in

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I agree with the majority that the rules which ban activities that identify by name the malls' owners, managers, or tenants, which ban signage and written materials that interfere with the "commercial purpose of the mall," and which require pre-submission of all written materials, are unlawful because they are not content-neutral.

[2] Cf. Savage *v. Trammell Crow Co.*, 273 Cal. Rptr. 302, 308 (Cal. Ct. App. 1990) (upholding leafleting ban that is "narrowly drawn"), review denied (Dec. 13, 1990), cert. denied 500 U.S. 906 (1991).

[3] In *Sears*, the California Supreme Court recognized a labor union's right to engage in picketing and handbilling on private sidewalks and parking lots.

Waremart Foods v. NLRB,[4] questioning the continued validity of *Sears*.[5] Because I am aware of no California Supreme Court or intermediate appellate court decision that speaks to the issue of access to the exterior sidewalk of a shopping center (as opposed to a stand-alone store), for purposes of deciding this matter, I assume that under *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979),[6] a shopping center may impose reasonable time, place, and manner regulations on exterior sidewalk activity (and not just on interior activity).[7]

Contrary to the majority's view, the Respondents have not offered sufficient *objective* evidence to justify their total ban on noncommercial expressive activity from the malls' exterior sidewalks. For example, the Respondents' witnesses testified in a conclusory manner that the sidewalks outside the mall are only of average width, and would not accommodate a large group of people. Rather than narrowly tailoring the rules to address the number of people who could be present on the sidewalk while still allowing the expressive activity, the Respondents simply banned all expressive activity from the sidewalk.[8] Such a rule is overbroad, and accordingly is contrary to California law. *In re Hoffman*, 434 P.2d 353, 358 (Cal. 1967). These rules do not pass constitutional muster just because the Locals have access to the malls' interiors. *See H-CCH Associates v. Citizens for a Representative Government*, 238 Cal. Rptr. 841, 853 (Cal. Ct. App. 1987) ("A regulating authority may not adopt rules which preclude the exercise of free expression in an appropriate place, even on the ground that another place is available."), review denied (Oct. 29, 1987), cert. denied, 485 U.S. 971 (1988).

The Respondents, and the majority, rely on decisions of lower California courts that have upheld similar designated area and peak traffic bans. In particular, they refer to *Needletrades Employees v. Superior Court of Los Angeles*, 65 Cal. Rptr. 2d 838 (Cal. Ct. App. 1997) ("UNITE"). The facts in that case, however, are distinguishable. Thus, one mall owner in UNITE presented evidence that allowing a union to handbill directly in front of a specific store would violate local fire regulations, and that the designated areas the union objected to "were selected to comply with [those] regulations." Id. at 848. Conversely, in this case, the Respondents offered no evidence that expressive activity on the malls' sidewalks was prohibited by any governmental regulations. Indeed, the rules enacted by the other *UNITE* mall owners were lawful because the time, place, and manner regulations concerning expressive activity were based on multiple objective criteria. Id.

Similarly, this case is distinguishable from *Costco*, supra, 117 Cal. Rptr. 2d at 344. Although the rules at issue in that case, as here, involved a peak traffic ban, the record amply supported the rationale for the store owner's ban as well as its other restrictions. Id. at 352. Thus, the store owner "presented evidence that expressive activity at its stores had imposed upon it considerable expense, administrative burdens and risks which directly impaired the commercial purpose of the stores." Id. Here, conversely, the Respondents have offered no evidence that expressive activity interfered with normal business operations or could be reasonably expected to do so.[9]

Dated, Washington, D.C. August 27, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[4] 354 F.3d 870 (D.C. Circuit 2004), denying enforcement of the Board's order in *Winco Foods*, 337 NLRB 289 (2001) (holding that a nonunion supermarket had engaged in unfair labor practices by attempting to bar union organizers from distributing literature in the store's parking lot).

[5] Although California law appears to protect labor-related handbilling on private property, the D.C. Circuit reasoned that to the extent that the State law afforded special protections to labor handbilling, it was content discriminatory in violation of the First Amendment. 354 F.3d at 874–875. While the D.C. Circuit did not directly overturn the California law—it instead "construe[d] it to avoid unconstitutionality." Id. at 875.

[6] *Robins* involved California constitutional standards applicable to any expressive activity, as opposed to *Sears*, which involved special standards under California law applicable to only labor activity.

[7] Accordingly, I find it unnecessary to pass on whether *Sears* is still good law.

[8] Cf. *Costco Cos. v. Gallant*, 117 Cal. Rptr. 2d 344, 347 (Cal. Ct. App. 2002) (restricting expressive activity to designated areas in front of the store by a maximum of three handbillers).

[9] Thus, this is case is also distinguishable from *Savage*, supra, 273 Cal. Rptr. at 306, where Trammell Crow "could reasonably conclude" that without a ban on leafleting in the parking lot, the amount of litter would increase. The court found the policy "especially appropriate in light of the fact that [the] policy here does not prevent leafleting on the center's sidewalks." Id. Here, the Respondents have excluded the Unions from all exterior areas.

WE WILL NOT maintain and enforce a rule banning activities that identify by name the Arden Fair Mall owner, manager, or tenants.

WE WILL NOT maintain and enforce a rule that bans signage and written materials that "interfere with the commercial purpose" of Arden Fair Mall.

WE WILL NOT maintain and enforce a rule that requires the presubmission of written materials for the purpose of enforcing the two rules cited above.

WE WILL NOT interfere with handbilling or picketing at Arden Fair Mall by maintaining an unlawful application policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rules indicated above, and remove the language from the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Arden Fair Mall, and from any other document within our custody and control wherever such rules may be contained.

MACERICH MANAGEMENT CO.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and enforce a rule that bans activities that identify by name the Capitola Mall owner, manager, or tenants.

WE WILL NOT maintain and enforce a rule that bans signage and written materials that "interfere with the commercial purpose" of Capitola Mall.

WE WILL NOT maintain and enforce a rule that requires the pre-submission of written materials for the purpose of enforcing the two rules cited above.

WE WILL NOT interfere with handbilling or picketing at Capitola Mall by maintaining an unlawful application policy, by threatening to cause the arrest of, and by causing the arrest of individuals affiliated with Carpenters Local 505, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL NOT rescind the rules indicated above, and remove the language from the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Capitola Mall, and from any other document within our custody and control wherever such rules may be contained.

MACERICH PROPERTY MANAGEMENT CO.

Shelly Brenner, for the General Counsel.

Thomas J. Leanse, Stacey McKee Knight, and Karen Stephenson (Katten, Muchin & Zavis), of Los Angeles, California, the for Respondents.

Sandra Rae Benson, Kristina L. Hillman, and *William Sokol (Van Bourg, Weinburg, Roger & Rosenfeld),* of Oakland, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, March 20–29, 2001. On June 2, 2000, United Brotherhood of Carpenters and Joiners, Local 586, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, (Local 586) filed the charge in Case 20–CA–29636–1 alleging that Macerich Management Company (Respondent Macerich Management) committed certain violations of Section 8(a) (1) of the National Labor Relations Act. On May 3, 2000, United Brotherhood of Carpenters and Joiners, Local 505, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Local 505) filed the charge in Case 20–CA–29918-1, formerly known as Case 32–CA–18123–1, alleging that Macerich Property Management Company (Respondent Macerich Property) committed certain violations of Section 8(a)(1) of the Act. The Union filed an amended charge on September 8, 2001. On March 16, 2001, the Regional Director for Region 20 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondents alleging that they violated Section 8(a)(1) of the Act. Both Respondents filed timely answers to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

FINDINGS OF FACT

I. JURISDICTION

Respondent Macerich Management is a California corporation, with offices and places in various locations in California, and is engaged in the business of managing properties, including Arden Fair Mall Shopping Center in Sacramento, California. Respondent Macerich Property is a California corporation, with offices and places of business in various locations in California, and is engaged in the business of managing properties, including the Capitola Shopping Center in Capitola, California. Respondents stipulated and I find that they were each an employer within the meaning of Section 2(2), (6) and (7) of the Act.

Respondents admit and I find that Local 586 and Local 505 are each a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The complaint alleges that Respondent Macerich Management and Respondent Macerich Property committed violations of Section 8(a)(1) at Arden Fair Mall and Capitola Mall, two California shopping centers which Respondents respectively manage, by: (1) maintaining and enforcing overly broad and unreasonably restrictive time, place, and manner access rules: and (2) ejecting and /or causing the arrest of union representatives who were engaged in peaceful area standards activities on Respondents' respective mall properties.

The rules alleged to be impermissible are virtually identical at the two malls: (1) a ban on activities that identify by name the mall owner, manager, or any tenant in the mall: (2) a ban on signage and written materials that interfere with the "commercial purpose" of the mall; (3) a ban on the carrying or wearing of signs; (4) an application process that requires the presubmission of written materials; (5) the exclusion of the malls' exterior areas, including mall sidewalks, from designated areas where activities may occur; and (6) the application of the malls' prohibition on activities during "peak traffic days" to the malls exterior areas.

With respect to specific incidents of Respondents' unlawful interference with the access rights of union representatives, the complaint alleges that on December 16, 1999, Respondent Macerich Management unlawfully ejected representatives of Local 586 from Arden Fair Mall at a time when Local 586 representatives were engaged in peaceful area standards handbilling at the interior entrances of the targeted employer within the mall. The complaint also alleges that on March 7and 21 and May 3, 2000, Respondent Macerich Property ejected and/or caused the arrest of representatives of Local 505 from Capitola Mall at a time when the Local 505 representatives were engaged in peaceful area standards picketing at the interior entrances of the targeted employers within the mall. In their timely answers, Respondents denied that it engaged in the unfair labor practices alleged.

B. Facts

1. The malls

Arden Fair mall consists of a large two-story enclosed building, about three blocks long and a couple of blocks wide. The building is surrounded by private sidewalks and parking lots. There is a public sidewalk running along the exterior of the property.

The anchor tenants of Arden Fair mall, such as Sears, J.C. Penny's, and Nordstrom, own their own buildings and the underlying land on which the buildings are located. The remaining property is owned by Arden Fair Associates, a general partnership. Arden Fair Associates leases space to the other tenants occupying the mall. A Reciprocal Easement Agreement (REA) between Arden Fair Associates and the anchor tenants provides the parties to the REA with reciprocal easements over the common areas of their respective properties for the passage of all users of the mall, and the passage and parking of vehicles. The common areas include the parking structures, parking lots, perimeter sidewalks and interior corridors of the mall. The easements also entitle Arden Fair Associates and the anchor tenants to eject individuals from the common areas who are not authorized to be on the property. At all times material, Arden Fair Associates has contracted with Respondent Macerich Management to provide all necessary services for management of Arden Fair Mall, including the Arden Fair Associates' management responsibilities under the REA.

Capitola Mall consists of a one to two-story enclosed building surrounded by parking lots and exterior sidewalks. The anchor tenants, such as Sears and Mervyn's, own their own buildings and the underlying land on which the buildings are located. The remaining property is owned by The Macerich Partnership, a general partnership. The Macerich Partnership leases space to the other tenants occupying the mall. A Reciprocal Easement Agreement (REA) between the Macerich Partnership and the anchor tenants provides the parties to the REA with reciprocal easements over the common areas of their respective properties for the passage of all users of the mall, and the passage and parking of vehicles. The common areas include the parking structures, parking lots, perimeter sidewalks and interior corridors of the mall. The easements also entitle the Macerich Partnership and the anchor tenants to eject individuals from the common areas who are not authorized to be on the property. At all times material, the Macerich Partnership has contracted with Respondent Macerich Property to provide all necessary services for management of Capitola Mall, including the Macerich Partnership's management responsibilities under all leases and occupant agreements, including the REA.

2. The events at Arden Fair Mall in December 1999

In the fall of 1999, Local 586 learned that Wadman Construction, a non-union employer, was building a new Sears store in Roseville, California. Local 586 determined that Wadman Construction was not paying area standards wages and benefits to its carpenter employees on the Roseville jobsite. To publicize its dispute with Wadman Construction's pay practices, Local 586 decided to handbill on December 16, 1999, at existing Sears stores at three shopping centers in the Sacramento, California area. Arden Fair Mall was one of these three shopping malls.

On December 8, 1999, Tom Brodsky, a representative of Local 586, went to the management office of Arden Fair Mall to investigate the mall's policies regarding the public dissemination of information on mall property. Brodsky spoke with Nora Bailey, in the management office of Respondent Macerich Management. Brodsky asked if there were any forms that he needed to fill out and turn in. Bailey told Brodsky that "people just come in to do their activities." Brodsky also notified the

local Sheriff's office of Local 586's plan to distribute handbills at the Sears store in the Arden Fair Mall. The Sheriff, believing that he did not have jurisdiction over the Arden Fair mall, contacted the Sacramento Police department for Brodsky.

On December 16, Brodsky met with the persons who would handbill on behalf of Local 586. He distributed handbills and told the employees to begin handbilling at 9:30 a.m. The handbill was two-sided and read as follows:

[side one]

COME SEE THE DARKER SIDE OF

Substandard wages
No health care for families
Inadequate vocational training
No pension or retirement plans

> Sears often uses contractors that pay substandard wages to their workers. Many more do not provide health or pension benefits. In addition, young workers on these projects have no access to any vocational training that would allow them to learn a skilled trade to advance their career. These construction practices put a real burden on our community. In effect, taxpayers are subsidizing Sears' construction by paying for the health care and social services that these working families need and deserve through government subsidies.

Please don't shop at SEARS unless they stop using
Contractors who abuse working families!
Thank you for your support
Carpenters for a living wage

[side two]

SEARS?
DOES SEARS
GIVE THE GOOD LIFE
AT A GREAT PRICE?

Jon Martino met in the Arden Fair Mall parking lot with four other handbillers. Martino distributed flyers that he had obtained from Brodsky and T-shirts for the employees to wear. The T-shirts bore the same message as the leaflets. Martino and another leafletter stood by the first floor entrance to the Sears store. Martino instructed the other leafletters to handbill at the exterior entrances of the Sears store. Martino wanted to make sure that all the Sears' entrances were covered.

Martino and Shawn McCartney stationed themselves at each of the two sides of the interior mall entrance to Sears and began handing out the handbills. They made sure not to impede the passage of customers. After only 15 minutes of handbilling two individuals from Sears approached them. These individuals told Martino and McCartney that the two handbillers were trespassing and had to leave. Martin argued that he had a right to be there. The Sears personnel then called Arden Fair Mall security.

Franklin Fisher, an Arden Fair mall guard responded to the call. Fisher requested that the two Local 586 employees leave the mall if they intended to continue their handbilling without complying with the mall's rules for public use of common areas. Fisher then escorted McCartney out of the building to McCartney's car in the parking lot. Martino remained at the entrance to Sears and had no further dealings with Fisher that day. [2]

After hearing of Martino's problems at the mall, Brodsky went to the mall to investigate the mall's rules regarding public access. Brodsky obtained a copy of an application form and a copy of the "Arden Fair Mall Rules for Public Use of Common Areas." Brodsky took the packet with him to Local 586's attorney, Amy Martin. Brodsky, with Martin's help, filled out the application and Brodsky turned the completed application to the mall's service center that afternoon around 3:30 p.m. Brodsky was told that his application was missing two pages and he was given copies of the missing materials. The service center employee told Brodsky that his application would be denied because of the dates on which Local 586 proposed to handbill. She also told Brodsky that he should expect a response to his application in a couple of days.

Richard Wright, vice president and executive director of the Northern California Carpenters Regional Council, oversees the picketing and organizing activities of all Locals covered by the Northern California Carpenters Regional Council, including Local 586 and Local 505. Wright testified that he had a conversation with an attorney for Respondent Macerich Management, on December 17 (the correct date was December 16) in which the attorney stated that Wright would be lucky if Respondent Macerich Management's review of Local 586's application would be completed or approved "within two months, if at all, and this is how they kept people they didn't want at the mall . . . off their property."

Counsel for Respondents, Thomas Leanse, testified that he had this conversation with Wright on December 16, shortly before noon (before Local 586 filed its application). Leanse denied making such a threat and testified that he merely informed Wright that Local 586 needed to submit an application to leaflet and that the application might not be approved for the balance of the calendar year because of the peak period ban. I credit Leanse's version of this conversation. First, I find it unlikely that Leanse would say "this is how they kept people they didn't want ... off their property." Leanse is too careful to make such a statement. Further, having drafted these rules, Leanse was more likely to use the rules in general, and the peak period rule in particular, to deny access.

On December 17, Brodsky returned to the mall's management office to inquire about the status of Local 586's application to handbill at the mall. Brodsky spoke with Carmen Lyttle, mall manager. Lyttle told Brodsky that the mall's attorney would contact Local 586's attorney. Lyttle told Brodsky that his application was missing a copy of the handbill. Brodsky went to his truck and retrieved a copy of the handbill for Lyttle.

On December 22, Local 586 received a letter from Lyttle rejecting Local 586's application to handbill. The letter rejected Local 586's application as untimely, incomplete, and ambiguous, specifically:

> The application was submitted on the same day of the activity rather than four business days in advance and, therefore, was untimely.
>
> The application did not include a legible copy of the handbill.

[2] At some point, the Sears representatives and Martino got into a scuffle. Martino was placed under citizen's arrest by the Sacramento police. Unfair labor practice charges against Sears were settled.

The application did not specify the three-day period the activities were to take place, but only noted "12–16–99-On."

The application did not furnish a $50 cleaning deposit or, alternatively, a completed Indemnity Agreement.

The application did not furnish all the names of the participants.

The application was signed by Local 586 Attorney Ami Martin, rather than Brodsky, without any evidence that Martin was the Union's authorized representative.

The application failed to identify Local 586's preferred Designated area where the Union wished to carry out its proposed activities.

The Union did not submit another application after receiving the mall's December 21, rejection letter.

3. The events at Capitola Mall in March and May 2000

In early 2000, Local 505 determined that Construction Developers, Inc., was paying its employees below area standards wages and benefits established by Local 505. Construction Developers was performing construction work at the Capitola Mall for a Gottschalk Expressions store. On March 7, Local 505, decided to set up a picket line at the Expressions store at Capitola Mall.

Edward Van Valkenburgh, a representative for Local 505, was supervising handbilling on March 7, on the mall's exterior sidewalks outside the mall's entrances and the exterior entrance to the Expressions store. The leaflets read as follows:

[side one]

CAPITOLA MALL'S dirty little secrets!!
While posing as a good community member, behind the scenes Capitola Mall

Allows contractors without local business licenses to work at the Mall in violation of municipal code and depriving the community of revenue to support general services;

Welcomes out-of-state contractors, contractors who import out-of state workers ... depriving local residents and the local economy of potential revenue and economic benefits;

Welcomes contractors who undermine area wages and benefits by underpaying workers on projects built at the Mall;

Commits Unfair Labor Practices, in violation of Federal Law to hide the practices of some contractors working at the Mall.

CAPITOLA MALL has the power to end these practices
But they won't, unless you help!!

Please deliver this leaflet to the cashier of your favorite Mall store; Ask them to share your concern with the Mall Management.

Together we can make a difference and Capitola Mall can
Support the community that supports the Mall and its Merchants

We appreciate your support!!
Carpenters L.U. 505

This is not a strike against this establishment. We do not seek any work stoppages or refusal to make deliveries or to handle any goods.

[side two]

The second side had a circle with a slash through it. "Capitola Mall" was written across the slash. The words "Unfair to Labor and the community" were written on the circle's boundaries. The leafletters also wore T-shirts with similar, but a more abbreviated version of the text contained in the leaflets.

At a certain point, Van Valkenburgh left the handbillers to go inside the mall with Richard Wright. Wright had been arrested at the mall on March 2. Wright and Van Valkenburgh entered the mall to check the construction site and to photograph the area where Wright had previously been arrested. Van Valkenburgh noticed that employees of Construction Developers, Inc., were working at the Gottschalk Expressions jobsite and he and Wright decided that Local 505 would picket Construction Developers.

On March 7, Local 505 set up its picket at the interior entrance to the Expressions jobsite. Two Local 505 picketers were walking back and forth carrying signs along a temporary wall. The corridor was approximately 30 feet wide. There were ten feet to fifteen feet between the temporary wall and planters in the middle of the corridor. They took precautions not to prevent anyone from entering or leaving the jobsite and not to block customers from using the hallways. Wright and Van Valkenburgh supervised the picketing. The signs read, "Construction Developers, Inc., fails to pay wages and benefits established by carpenters in this area, Local 505."

After a few minutes, four mall security guards appeared and one of them began videotaping the picketing. Shortly thereafter, Mark Letendre, mall manager, approached Van Valkenburgh. Letendre offered Van Valkenburgh a copy of the Capitola Mall Rules for Public Use of Common Area but Van Valkenburg declined to accept the copy because he had previously obtained a copy of the rules. Wright similarly declined a copy of the rules.

Letendre read from a prepared statement that the Local 505 personnel had to leave the property if they wished to continue their activities, that they did not have an approved application on file and that they would be subject to arrest if they did not leave. Wright told Letendre that Local 505's dispute was with Construction Developers and not with the mall or any of its tenants. Wright also stated that under California Penal Code Section 602 (n),[3] Local 505 had a right to be in the mall. Wright asked if there were any other entrances to the Expressions jobsite and Letendre answered that there were more entrances around the back of the building.

Wright and Van Valkenburgh then set up pickets at the other entrances to the Expressions jobsite. Van Valkenburgh went to the leafletters and told them to stop handbilling and to take off

[3] Cal. Penal Code section 602 (n) states:

Except as provided in Section 602.8, every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:

(n) Refusing or failing to leave land real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by (1) a police officer at the request of the owner, the owner's agent, or the person in lawful possession, and upon being informed by the police officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession....However, this subdivision shall not be applicable to persons engaged in lawful labor union activities that are permitted to be carried out on the property by the California Agricultural Labor Relations Act.... or by the National Labor Relations Act.... this subdivision shall not apply to persons on the premises who are engaged in activities protected by the California or United States Constitutions.

their T-shirts. He then prepared additional pickets signs. Local 505 then placed pickets at the four doorways to the jobsite. These pickets placed at exterior entrances were careful not to block any doorway or to prevent any vehicles from entering or exiting.

Shortly thereafter, the police arrived where the two pickets were picketing at the interior entrance to Expressions. The police officer informed Wright and Van Valkenburgh that if the pickets did not leave, they would be subject to citizen's arrest by Jose Murillo, a security guard. The Union representatives left the premises and were not arrested.

On March 21, Wright and Van Valkenburgh decided to picket Construction Developers at the Expressions jobsite at Capitola Mall. This time Local 505 had in excess of 20 individuals picketing at the same five locations. There were four pickets assigned to the interior entrance to the expressions jobsite

These pickets walked along the temporary wall leaving as much space as possible in the corridor. They used the same sign language as on March 7.

After picketing for approximately 15 minutes, Wright was approached by Letendre. Letendre read from a prepared statement stating that Wright had to remove his leaflets and placards, that the mall did not have an approved application from Local 505 on file, and that if Wright did not leave immediately, he would be subject to arrest. [4] Wright responded that he had a right to be there under California Penal Code Section 602 (n) and that he was going to stay. Murillo, the security guard, asked Wright to leave and when Wright refused, a police officer placed Wright under citizen's arrest. Wright was booked and taken to jail. The three other picketers also refused to leave and were arrested and taken to jail.

On May 3, 2000, Local 505 again decided to picket a construction employer working at the Capitola Mall. This time Local 505 sought to publicize Hardcastle Construction's failure to pay area standard wages and benefits at its Software Etc., jobsite at the Capitola Mall. The picket signs read, "Hardcastle Construction, Inc., fails to pay wages and benefits established by carpenters in this area, Local Union 505." The four picketers were located outside the only entrance to the jobsite, which was located in the interior of the mall.

About an hour after the picketing began, the pickets were approached by Letendre and mall security. Letendre read from a prepared statement and told the pickets that the mall did not have an approved application from Local 505 on file and that they had to leave the property and remove their placards or they would be subject to arrest. Wright informed Letendre that the pickets were not leaving. The four representatives continued to picket until the police arrived and arrested them.

It is undisputed that Wright intentionally did not make an application to leaflet or picket for the conduct at issue on March 7 and 21 or May 3, 2000. Wright testified that if he followed Respondent Macerich Property's rules, he would have violated the Board's *Moore Dry Dock*[5] rules and thereby violated Section 8(b)(4)(B) of the Act.

4. The rules at issue

At relevant times Respondents have maintained and applied time, place, and manner rules (rules) designed for application to all persons who wish to engage in expressive activity at the Arden Fair Mall and Capitola Mall. Since the rules were formulated, the malls have always required individuals and groups seeking to handbill at the malls to comply with the applicable rules. The rules require that persons seeking to engage in expressive activity must first complete and submit an application for access for noncommercial expressive activities on a form provided by Respondents.

The rules are applicable to expressive activity other than activities sponsored by the mall or its tenants as well as "activity otherwise expressly allowed on Center Property by the National Labor Relations Act or state labor laws." The rules contain the following pertinent restrictions:

> II. DEFINITIONS
>
> C. Approved Activity
>
> Actions will not be approved:
>
> 6. Activities which identify the Center owner, manager, or any tenant in the Center.
>
> . . . .
>
> F. Designated Areas "Designated Area(s) are those area(s) identified in Exhibit A to the Rules.... Approved Activities may only be conducted within Designated Areas.
> [Exhibit A depicts two Designated Areas located in the interior of the mall.]
>
> III. Application Process and Procedures
>
> . . . .
>
> B. Attachment to Application Applications must be accompanied by legible copies of any and all items intended to be used, including but not limited to any audio-visual materials, and the text, artwork and pictures on any petitions, literature, leaflets signs and displays.
>
> IV. Permitted Locations (Designated Areas)
>
> F. Designated Areas
>
> Designated Area(s) are those area(s) identified in Exhibit A to the Rules... Approved Activities may only be conducted within Designated Areas.
>
> . . . .
>
> X. Peak Traffic Days [only challenged as applied to exterior areas of the malls]
>
> The Center's management has designated certain days during each calendar year as "peak traffic days" when all Non-Commercial Expressive Activity is prohibited. Application for those days will not be approved.
>
> A list of peak traffic days is attached to these Rules as Exhibit B. The management reserves the right to amend this list. All Peak Traffic Days will be designated at least thirty (30) days

[4] Letendre testified that Wright was acting in an aggressive manner and that Wright was very agitated. I do not credit this testimony. The videotape of this incident does not corroborate Letendre's testimony.

[5] *Sailors' Union (Moore Dry Dock)*, 92 NLRB 547 (1950). Picketing at a common situs is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

> in advance of the next new Peak Traffic Day. [Exhibit B contains a list of dates when all non-commercial expressive activity is prohibited. These dates coincide with traditional holidays and sales days.]
>
> . . . .
>
> XII. Signage and Written Material
>
> B. Signs, posters, placards, displays or written materials may not interfere with the commercial purpose of the Center or its tenants.
>
> . . . .
>
> E. Participants may not carry or wear any signs, posters or placards.

Under the rules, persons desiring to engage in expressive activities must submit a written application more than four days but less than 20 days before the proposed activity. All materials to be used during the proposed activity must be attached to the application. The Rules restrict usage of the mall property to 6 days per application and preclude any activities during 30 days that the mall designates as "peak traffic days." In addition to the rules related to expressive activity, the center has also maintained a code of conduct applicable to persons entering the center property. Public notice of the code of conduct is provided by means of signs posted at all entrances to the Mall's parking lots that read as follows:

> [Mall} HAS ESTABLISHED A CODE OF CONDUCT FOR VISITORS OF THIS PROPERTY. FAILURE TO FOLLOW THAT CODE MAY RESULT IN EXCLUSION FROM USE OF THIS FACILITY AND/OR ARREST FOR CRIMINAL CONDUCT. THE CODE IS AVAILABLE AT THE CONCIERGE DESK.
>
> PRIVATE PROPERTY. SOLICITATION OR DISTRIBUTION OF HANDBILLS IS STRICTLY PROHIBITED - SEC. SAMC 16.3 16.4."

The Code of Conduct establishes rules of decorum applicable to all Mall visitors. Among other things, the Code prohibits fighting; defacing or destroying Mall property; running, skating, skateboarding and bicycling; littering; soliciting money or donations "except with the prior written permission" of the mall management; tampering with the mall equipment; and engaging in unlawful or criminal conduct. The code also provides for minimum standards of attire and establishes a policy of progressive exclusion penalties for violations of the Code.

The Rules state that some of the rules may not apply to certain labor activities. The introduction to the rules states:

> Some of the Rules may not apply to persons attempting to organize employees of persons or businesses engaged in work at the center who have a labor dispute with the employer. Some of the Rules also may not apply to employees of persons or businesses engaged in work at the Center. Nevertheless, all persons asking to use the Center's common areas for other than Center-sponsored or tenant sponsored activity must submit an application.

The malls have "Internal Policies and Guidelines for Public Use of Common Area" which are standardized internal policies used by the malls to implement the Rules. The Internal Policies are confidential and not made available to the public, including labor unions seeking to engage in activities at the malls. The Internal Policies define "labor activities" as:

> Employees of persons or businesses engaged in work at the Center who has a "labor dispute" with their employer may not be required to comply with certain Center rules, including rules limiting the location and subject matter of the planned communication. Individuals or labor unions who are attempting to organize employees of persons or businesses engaged in work at the Center also may not be required to comply with certain Center rules. For purposes of these Guidelines, the term "labor dispute" means any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.

The rules do not specify which rules are inapplicable to "labor disputes". However, the internal policies state that certain labor disputes may not be confined to the malls' designated areas and that the rules limiting the subject matter of the communication may not apply to certain labor disputes. The Internal Policies further state, "If the Center's owner, a Center tenant, or someone else working at the center is involved in a labor dispute, then the National Labor Relations act or California labor law may require that special arrangements be made to accommodate that particular activity." The Internal Policies further state:

> Unless the proposed activity is a labor dispute, as defined in these Guidelines, you may not approve an application for an activity that targets and/or identifies by name the Center's owner or manager, or a tenant in the Center. For example, you may not approve a non-labor related application for an activity which seeks to encourage patrons to "Boycott Bullocks," but you may not reject an application that is labor-related and meets the criteria set forth under "Labor Activities" herein.

The Internal Policies require the mall management to immediately forward to Respondents' legal counsel any applications which are "submitted by employees of persons or businesses engaged in work at the Center and [relate] to a labor dispute" with their employer, or if an application indicates the applicant's purpose is to organize persons working at the Center."

At the hearing, Respondents gave no explanation as to which, if any, of the other Rules were not applicable to "labor activities."

Arden Fair Mall's designated areas are two areas located inside of the mall building on the ground floor, each in a separate corridor leading from back entrances into the building. None of the exterior entrances to the mall is included as a designated area. The alleged purpose of the designated areas is for traffic flow and safety issues. The Capitola Mall also has two designated areas inside the mall building. One area is an interior courtyard and the other area is outside the Food Court.

Respondents' Rules provide for a complete ban on all non-commercial activity during peak traffic days. The Internal Guidelines define "peak traffic days" to be the thirty busiest days of the year. Arden Fairs' peak traffic days for 1999, were from November 26 through November 28 and December 4 through December 31. Capitola Mall's peak traffic days for 1999 were April 2 through April 3, November 26 through November 28, December 4 through December 27 and December 30 to December 31. The days shown for 2000 are April 21

through April 22, November 25 through 26, and December 2 through 27.

5. Conclusions

As the Board recently stated in *Glendale Associates, Ltd.*, 335 NLRB 27 (2001):

> In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the United States Supreme Court held that an employer may lawfully bar nonemployee union organizers from private property (unless the employees are inaccessible through usual channels). In the absence of a private property interest, however, the Court's holding in Lechmere is not controlling. See *Bristol Farms*, 311 NLRB 437, 438, fn.6 (1993) ("employer's exclusion of union representatives from private property to which the employer lacks a property right entitling it to exclude individuals likewise violates Section 8(a)(1) assuming the union representatives are engaged in Section 7 activities"). See also *Indio Grocery Outlet*, 323 NLRB 1138, 1142 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999).
>
> The Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. *Bristol Farms*, 311 NLRB at 438. The Board does so because it is State law, not the Act, that creates and defines the employer's property interest. Thus, an employer cannot exclude individuals exercising Section 7 rights if the State law would not allow the employer to exclude the individuals. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 at 638; Johnson & Hardin Co., 305 NLRB 690 (1991).

The California Supreme Court held in *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), that the free speech and petition provisions of the California State Constitution protects the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner regulations by the property owner.[6]

In *Pruneyard*, the California Supreme Court endorsed the right to implement time, place, and manner rules to assure that the activities at issue "do not interfere with normal business operations [and] would not markedly dilute [the owner's] property rights." The United States Supreme Court also endorsed time, place and manner restrictions under the First Amendment "provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

In *Glendale Associates*, supra, the charging party-union handbilled near the Disney Store at the Glendale Galleria retail shopping center in Glendale, California.. After commencing handbilling, union officials were informed of the rules regulating handbilling and were given an application and a packet of materials explaining what was necessary for compliance. The union submitted an application that contained several deficiencies including the failure to furnish to the respondents the names of those expected to participate and the failure to remove reference to the "Disney Store" on the handbills. The union complied with the former request but declined to remove reference to the "Disney Store" from the handbills.

Relying on *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Board stated that California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner regulations by the property owner. It found that the removal of the reference to the "Disney Store" on the handbills appeared to be essentially a content-based restriction and not a "time, place and manner" restriction permitted under State law. The Board found the respondents' rule requiring advance identification of handbillers by name did not violate Section 8(a)(1). In contrast to the content-based rule prohibiting identification of a tenant on the handbill, the rule requiring advance notice of prospective handbillers was found to be consistent with legitimate time, place, and manner purposes under State law. Under California law, the rule allows identification of persons who may previously have caused injury or damage to the shopping center and facilitates verification, for liability purposes, of the identity of those authorized on the handbill.

B. The Union's Labor Dispute and its Handbilling

At the relevant times, Local 505 had a primary labor dispute within the meaning of Section 2(9) of the Act with Construction Developers, Inc., because Local 505 believed that Construction Developers failed to pay area standards wages to its employees. Similarly, Local 505 had a primary labor dispute with Hardcastle Construction, Inc., because Local 505 believed that Hardcastle failed to pay area standards wages to its employees Peaceful area standards picketing is considered primary picketing protected by the Act. *Makro, Inc.*, 305 NLRB 663 (1991); *Mega Van & Storage*, 294 NLRB 975, 977 (1989). Local 505 had no primary labor dispute with Respondent Macerich Property, Gottschalk Expressions, Software Etc., or any mall tenant.

Local 586 had no primary labor dispute with the Respondent Macerich Management or any of the mall tenants. However, in December 1999, the Union peacefully distributed handbills at the Arden Fair Mall because Sears used Wadman Construction, which paid substandard wages, for construction at a Sears store. The handbilling, which mentioned Sears but did not mention Wadman Construction, was directed at getting information relating to the substandard wages to consumers and the general public.

Generally, peaceful area standards handbilling enjoys protection under Section 7 of the Act. *Leslie Homes*, 316 NLRB 123 (1995). Similarly, publicity other than picketing, such as handbill appeals, by a labor organization for consumers to boycott a secondary employer that utilizes a substandard construction subcontractor does not run afoul of the secondary boycott proscriptions in Section 8(b)(4) of the Act. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988) (*DeBartolo II*). Since *DeBartolo II*, the Board has held that secondary handbilling addressed to consumers or the public is unregulated by Section 8(b)(4) when it is unaccompanied by picketing or other unlawful conduct. *Plumbers & Pipefitters Local 32 (Ramada, Inc.)*, 302 NLRB 919 (1991). Here, the Union had an ongoing area standards dispute with Wadman and the handbills it distributed at Arden Fair Mall called for a boycott of Sears products because that retailer utilized Wad-

[6] The United States Supreme Court, *in Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980), upheld California's right under its State Constitution to restrict the property rights of shopping center owners.

man's construction services. Based on these principles, I find that Local 586's handbilling was protected by the Act.

California's *Pruneyard* doctrine, which is based on the free speech provisions of the California State constitution, treats private shopping centers and comparable properties open to the public as "public forums," where expressive activities are protected. *Robins v. Pruneyard*, 151 Cal. Rptr. 854 (1979), affd. 447 U.S. 74 (1980). The recognition of California's constitutional right to free speech in privately owned shopping centers was recently affirmed in *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 111 Cal. Rptr. 2d 336, 337 (2001).

In *Pruneyard*, the Supreme Court held that the State of California was permitted to provide greater constitutional protection for speech than provided by the United States constitution. Under California's broader constitutional guarantee, the court found that a shopping center did not have a right to expel high school students soliciting signatures for a petition in its privately owned central courtyard. In defining the breadth of the state constitutional speech protection, the *Pruneyard* court relied on *Schwartz-Torrance v. Bakery & Con. Workers Union*, 40 Cal. Rptr. 2333 (1964), cert. denied 380 U.S. 906 (1986) and In *Re Lane*, 79 Cal Rptr. 729 (1969), cases involving the First Amendment rights of union pickets/handbillers outside business establishments, as testifying to the "strength of 'liberty of speech' in the state." In *Schwartz-Torrance*, the California Supreme Court prohibited the owner of a strip-shopping mall from preventing union organizers from picketing in front of a bakery in the mall. Under the court's balancing test, the union's substantial free speech rights, in the context of state labor relations law, out weighed the owner's property rights "worn thin by public usage." Schwartz-Torrance 40 Cal Rptr. at 2338. *In Re Lane*, the California Supreme court enjoined the owner of a large, freestanding supermarket from excluding from the sidewalk in front of the store individuals peacefully handbilling concerning a labor dispute. The court held that "when a business establishment invites the public generally to patronize its store and in so to traverse a sidewalk opened for access by the public," the private ownership of the sidewalk does not prevent the exercise of constitutional privileges at or near the establishment's entrance. 79 Cal. Rptr. at 733.

California's Moscone Act prohibits courts from enjoining peaceful picketing or publicizing of a labor dispute at "any place where any person or persons may lawfully be" which does not involve fraud, violence or breach of the peace." Cal. Code of Civ. Proc. Section 527.3. In *Sears v. San Diego District Council of Carpenters*, 158 Cal Rptr. 370 (1979), the California Supreme Court held that the Moscone Act prohibited the ejection of picketers protesting Sears' refusal to adhere to a master carpentry agreement from the private sidewalk surrounding the Sears store. In doing so, the court found that independent of any constitutional right, the State of California could by statute or judicial decision permit activity on private property as a matter of State labor law. The Court noted *Robins v. Pruneyard*, which had previously been decided, and stated:

> The *Robins* decision rests on the California Constitution. In the instant case, our decision rests on the terms of Code of Civil Procedure Section; accordingly we express no opinion on whether the California Constitution protects the picketing here at issue.

The California Supreme Court also interpreted the Moscone Act as insulating from the court's injunctive power all union activity declared to be lawful under prior California Decisions, including *Schwartz-Torrance* and *In re Lane.* Additionally, the court found that labor activity protected by the Moscone Act to be considered "legal" for purposes of construing the labor activity exemption in California's trespass statutes. California's trespass statutes exempt "lawful" union activity from the definition of criminal trespass 158 Cal Rptr. at 380, fn. 9. See also *In re Catalano*, 171 Cal. Rptr. 667, 670 fn. 4 (1981) (union representatives could not be convicted of violating trespass laws for entering jobsite to investigate the safety of working conditions; statute exempts lawful union activity, as well as activities for the purpose of engaging in any organization effort).

Recently, the California Legislature passed California Labor Code Sections 1138 et seq. (effective January 2000) that specifies the procedural process through which a preliminary injunction is obtained. Although Section 1138 adds new procedural hurdles to obtaining preliminary injunctions, the legislation adopts the same definition of "labor dispute" found in the Moscone Act. As a result, the new statute does not change the relevant analysis.

> a. The Rules (1) Ban Activities that Identify by Name the Mall Owner, Manager, or Any Tenant in the Mall: (2) Ban Signage and Written Materials that Interfere With the "Commercial Purpose" of the Mall; (3) Ban the Carrying or Wearing of Signs; and (4) Require the Pre-Submission of Written Materials.

In *Glendale Associates*, 335 NLRB 27 (2001), the Board found that the Respondents violated Section 8(a)(1) of the Act by maintaining and enforcing a rule that prohibited union handbillers from identifying by name any tenant at the Respondents' facility. Relying on *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Board stated that California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner regulations by the property owner. It found that the prohibition of a reference to the tenant on the handbills was essentially a content-based restriction and not a "time, place and manner" restriction permitted under California State law.

Based on *Glendale Associates*, it appears that the ban on activities that identify by name the mall owner, manager, or any tenant in the mall; the ban of signage and written materials that interfere with the "commercial purpose" of the mall; and the requirement of the pre-submission of written materials, are content based restrictions and not "time, place and manner" restrictions permissible under California State law.

The rules ban the carrying or wearing of signs. The purpose of this rule is to prevent interference with the commercial purposes of the mall, i.e., to sell goods and services. Respondents do not want material on signs or apparel that would negatively impact on stores in the malls. I find that the reasonable consequence of the rule is to restrict a union's ability to protest the action of an employer present at the mall, with whom the union has a primary dispute. To that extent, I find that the rule is a content-based restriction prohibited under *Glendale Associates*. The rule does not seek reasonable time, place and manner restrictions on carrying or wearing signs but simply bans such materials completely.

b. The rules completely ban access to the exterior area of the malls and apply the peak traffic ban to the mall's exterior areas

The rules state that noncommercial expressive activity may be conducted only in designated areas and "are not allowed in any other location, including driveways and parking lots." The designated areas are all located in the interior common areas. Thus, the rules impose a ban on the exterior areas of the two malls.

The purposes of limiting activity to the designated areas is (1) to allow enough space on each side of an area to allow "easy traffic flow" and (2) to comply with local fire codes requiring from eight to ten feet clearances between an activity and entrances. The explanation for excluding sidewalks from the designated areas was that the sidewalks were not wide enough. In *Bristol Farms*, 311 NLRB 437, 439 (1993), the Board found that an employer violated Section 8(a)(1) of the Act by excluding nonemployees, who were engaged in peaceful leafleting and picketing, on the exterior sidewalk of a grocery store located in a California shopping mall. The Board citing *Pruneyard* held that the shopping center did not have a property interest sufficient to exclude expressive activity entirely from its exterior property. In *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), the Board cited *Pruneyard* as the basis for finding that the owner of a freestanding grocery store could not exclude peaceful union picketing and handbilling from the store's surrounding private sidewalk and parking lots. The Board citing *Sears*, 158 Cal. Rptr. 370, 378 stated:

> The sidewalk outside a retail store has become the traditional accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store . . . In such context, the location of the store whether it is on the main street of the downtown section . . . in a suburban shopping center or in a parking lot, does not make any difference.

Indio Grocery Outlet, 323 NLRB at 1142, quoting *Sears*, 158 Cal. Rptr. 370, 378. Thus, I find that Respondent did not have a sufficient property interest to ban peaceful picketing and handbilling from the exterior areas. Similarly, to the extent that the ban on activity on peak traffic days applies to the exterior areas, Respondent does not have a sufficient property interest to ban such activities.

c. The Interference with union activities at the malls

As stated above, Local 586 was engaged in peaceful area standards handbilling at Arden Fair Mall. *Edward J. DeBartolo Corp. v. Florida Building Trades Council*, 485 U.S. 568 (1988). However, Local 586 had not applied for a permit to engage in non-commercial expressive activity. I find that the absence of a permit was excused by the action of Respondent Arden Fair's conduct in informing Brodsky that there were no forms to fill out and "people just come in and do their activities." Thus, I find that Arden Fair's interference with Local 586's lawful handbilling on December 16, 1999, violated Section 7 of the Act under *Pruneyard* and *Glendale Associates.*

On March 7, 2000, Local 505 picketed at Capitola Mall without applying for a permit to engage in non-commercial expressive activity. The picketing was stopped because the Union did not have an approved application on file. Local 505 then picketed at four exterior entrances to the store site at which they had a primary dispute with Construction Developers, Inc. Respondent Macerich Property threatened the pickets at the interior entrance to the store with arrest. There is no evidence that the pickets at the exterior entrances were threatened with arrest. Accordingly, I find that since the pickets inside the mall did not have an approved application under reasonable time, place and manner rules they could be prevented from picketing inside the mall.

On March 21, 2000, Local 505 again sought to picket Construction Developers at the mall site. Local 505 picketed both inside and outside the mall. Again Respondent's officials approached the union officials and stated that Local 505 did not have an approved application on file. The picketers inside the mall were forced to leave and three pickets were arrested. There is no evidence that the pickets outside the mall were interfered with.

On May 3, Local 505 again sought to picket inside the mall. Local 505 picketed Hardcastle Construction at the entrance to the Software Etc. store while Hardcastle Construction was working at that store. Again Respondent Macerich Property's officials told the union officials that the pickets had to leave. The pickets did not leave and eventually were arrested. Local 505 did not attempt to comply with the time, place and manner policies and thus, cannot claim interference with its rights.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.
2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.
3. By prohibiting union agents from engaging in the peaceful distribution of consumer boycott handbills at the Arden Fair Mall on December 16, 1999, Respondent Macerich Management engaged in an unfair labor practice within the meaning of Section 8(a)(1).
4. Respondents engaged in unfair labor practices in violation of Section 8(a)(1) by promulgating, maintaining, and enforcing rules restricting the content of lawful picket signs, or handbilling, or written materials at the Arden Fair Mall and Capitola Mall.
5. Respondents engaged in unfair labor practices in violation of Section 8(a)(1) by promulgating, maintaining, and enforcing rules restricting lawful picketing or handbilling at the exterior areas at the Arden Fair Mall and Capitola Mall.
6. Respondents' unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
7. Respondents did not otherwise violate Section 8(a)(1) as alleged in the consolidated complaint.

REMEDY

Having found that the Respondents have engaged in a certain unfair labor practice, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondents will be required to post the attached notices in places at the Arden Fair Mall and Capitola Mall where notices to employees are normally posted. However, in order to assure that the employees whose rights would be vindicated by this decision will have a greater opportunity to receive information about the disposition of this matter, my recommended Order will require that Respondents also provide the Unions with signed and dated copies of the attached notices for posting by the Unions if they so choose.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Macerich Management Company. its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Preventing United Brotherhood of Carpenters and United Brotherhood of Carpenters and Joiners, Local Union 586, United Brotherhood of Carpenters and Joiners of America, AFL–CIO from distributing consumer boycott handbills at the Arden Fair in Sacramento, California, as long as Local 586 has taken all reasonable steps to comply with Respondent's lawful time, place, and manner restrictions on noncommercial expressive activity.

b. Promulgating, maintaining or enforcing any rule restricting the content of lawful picket signs, or handbilling, or written materials at the Arden Fair Mall.

c. Promulgating, maintaining, or enforcing any rule restricting lawful picketing or handbilling at the exterior areas at the Arden Fair Mall.

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Delete and expunge from its rules for noncommercial use of common areas, from its policies and guidelines for noncommercial use of common area of Arden Fair Mall and from any other document within the custody and control of Arden Fair Mall where such rules may be contained, any rule restricting the content of lawful handbilling or picketing at the Mall.

b. Delete and expunge from its rules for nonommercial use of common areas, from its policies and guidelines for noncommercial use of common area of Arden Fair Mall and from any other document within the custody and control of Arden Fair Mall where such rules may be contained, any rule restricting lawful handbilling or picketing at the exterior areas of the Arden Fair Mall.

c. Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of the Arden Fair Mall in Sacramento, California, copies of the attached notice marked "Appendix A."[8] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1999.

d. Sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

e. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The Respondent, Macerich Property Management Company. its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Promulgating, maintaining or enforcing any rule restricting the content of lawful picket signs, or handbilling, or written materials at the Capitola Mall.

b. Promulgating, maintaining, or enforcing any rule restricting lawful picketing or handbilling at the exterior areas at the Capitola Mall.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Delete and expunge from its rules for noncommercial use of common areas, from its policies and guidelines for noncommercial use of common area of Capitola Mall and from any other document within the custody and control of Capitola Mall where such rules may be contained, any rule restricting the content of lawful handbilling or picketing at the Mall.

b. Delete and expunge from its rules for noncommercial use of common areas, from its policies and guidelines for noncommercial use of common area of Capitola Mall and from any other document within the custody and control of Capitola Mall where such rules may be contained, any rule restricting lawful handbilling or picketing at the exterior areas of the Capitola Mall.

c. Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of the Capitola Mall in Capitola, California, copies of the attached notice marked "Appendix B."[9] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 2000.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

d. Sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

e. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, San Francisco, California, December 26, 2001.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit United Brotherhood of Carpenters and Joiners, Local Union 586, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Union), from lawful handbilling or leafleting as long as Local 586 takes steps to comply with our lawful time, place, and manner policies for noncommercial, expressive activities.

WE WILL NOT promulgate, maintain or enforce any rule restricting the content of lawful picket signs, or handbilling, or written materials at the Arden Fair Mall.

WE WILL NOT promulgate, maintain, or enforce any rule restricting lawful picketing or handbilling at the exterior areas at the Arden Fair Mall.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Nation Labor Relations Act.

WE WILL delete and expunge from our rules for noncommercial use of common areas, from its policies and guidelines for noncommercial use of common area of Arden Fair Mall and from any other document within the custody and control of Arden Fair Mall where such rules may be contained, any rule restricting the content of lawful handbilling or picketing at the Mall.

WE WILL delete and expunge from our rules for noncommercial use of common areas, from our policies and guidelines for noncommercial use of common area of Arden Fair Mall and from any other document within the custody and control of Arden Fair Mall where such rules may be contained, any rule restricting lawful handbilling or picketing at the exterior areas of the Arden Fair Mall.

MACERICH MANAGEMENT COMPANY

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate, maintain, or enforce any rule restricting the content of lawful picket signs, or handbilling, or written materials at the Capitola Mall.

WE WILL NOT promulgate, maintain, or enforce any rule restricting lawful picketing or handbilling at the exterior areas at the Capitola Mall.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Nation Labor Relations Act.

WE WILL delete and expunge from our rules for noncommercial use of common areas, from its policies and guidelines for noncommercial use of common area of Capitola Mall and from any other document within the custody and control of Capitola Mall where such rules may be contained, any rule restricting the content of lawful handbilling or picketing at the Mall.

WE WILL delete and expunge from our rules for noncommercial use of common areas, from our policies and guidelines for non-commercial use of common area of Capitola Mall and from any other document within the custody and control of Capitola Mall where such rules may be contained, any rule restricting lawful handbilling or picketing at the exterior areas of the Capitola Mall.

MACERICH PROPERTY MANAGEMENT COMPANY